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February 5, 2021: New York Review Letter to the Editor Concerning Originalism

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Title: New York Review Letter to the Editor Concerning Originalism

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2/5/2021--Back in December, I read a review of The Essential Scalia in the New York Review. The review was by Harvard Law Professor Noah Feldman. I sent the letter to the editor below to the Review. Professor Feldman even tried to help me get it published, but the NYR publishes hardly any letters to the editor anymore, let alone one by a non-famous person. The point of the letter was that originalism gets much too much credit as a theory of interpretation. In practice it is not. That is the point that needs to be emphasized.

***** To the Editors: Professor Noah Feldman felt he was stuck with the self-professed terms of Justice Scalia's jurisprudence in his review of The Essential Scalia [NYR, Dec. 17]. Nevertheless, it was a mistake for him to treat Originalism as if it were an actual theory of constitutional interpretation. In practice there are no "principles" of Originalism. It is easy to see this. As Professor Feldman points out, a major promise of Originalism is that it constrains judges from imposing their policy preferences on the rest of us in the guise of interpreting the Constitution. Therefore, if conservative Justices abandon originalism in pursuit of ideological commitments, Originalism would lose any claim of legitimacy, or even coherence. In practice, this is what conservative Justices, including Justice Scalia, have routinely done. Just as examples, Originalism plays no role in free speech jurisprudence, anti-affirmative action cases or the crucial rules regulating who can sue for what, known as justiciability. These examples could be multiplied. Probably the most dramatic example of the selective invocation of Originalism is the line of Free Exercise cases, beginning with *Trinity Lutheran Church v. Comer*, requiring states to include religious institutions in government spending programs. As Professor Feldman has shown in his academic writings, this line of cases amounts almost to anti-Originalism. The danger of treating Originalism seriously as a theory of interpretation is that it allows conservatives to pretend to neutrality rather than defend their ideological commitments on the merits. As a living constitutionalist myself, I agree with many of the above decisions. But Originalism they are not.